No. 93- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, individually and on behalf of all others similarly situated,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The collective bargaining agreement at issue in this case contains a provision, favored by the federal labor laws, establishing a grievance-arbitration system as the exclusive method of resolving contract disputes. The question presented is:

Whether, and if so under what circumstances, employees are free to litigate a breach of contract claim directly in federal court without ever having requested their union to pursue a grievance on the claim.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the Court of Appeals are named in the caption.

Additional defendants in the district court were John Morrell & Company, which was dismissed pursuant to a settlement, and Local 340, United Food and Commercial Workers, as to which the district court directed a verdict of dismissal at the close of the evidence.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	21

TABLE OF AUTHORITIES

CASES

	Page
Amburgey v. Consolidation Coal Co., 923 F.2d 27 (4th Cir. 1991)	17
Bailey v. Bicknell Minerals, Inc., 819 F.2d 690 (7th Cir. 1987)	21
Bowen v. United States Postal Service, 459 U.S. 212 (1983)	19
Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976)	20
Carr v. Pacific Maritime Association, 904 F.2d 1313 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991)	15, 16
Durham v. Mason & Dixon Lines, Inc., 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1961)	16
Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974)	20
Glover v. St. Louis-San Francisco R. Co., 393 U.S. 324 (1969)	14, 15, 17
Hendricks v. Edgewater Steel Co., 898 F.2d 385 (3d Cir. 1990)	16
Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976)	14
John Morrell & Co., 304 NLRB 896 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993)	8
Miller v. Chrysler Corp., 748 F.2d 323 (6th Cir. 1984)	16, 17
Paperworkers v. Misco, Inc., 484 U.S. 29 (1987)	20
Rabalais v. Dresser Industries, Inc., 566 F.2d 518 (5th Cir. 1978)	17
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)	13, 18, 20
Roman v. United States Postal Service, 821 F.2d 381 (7th Cir. 1987)	16
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	19
Teamsters Local v. Lucas Flour, 369 U.S. 95 (1962)	20
Terwilliger v. Greyhound Lines, Inc., 882 F.2d 1033 (6th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990)	16
Vaca v. Sipes, 386 U.S. 171 (1967)	13, 14

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
28 U.S.C. 1254(1)	2
Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d)	2, 20
Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a)	2, 3

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Food and Commercial Workers International Union, AFL-CIO CLC respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 993 F.2d 1463 and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-29a. The unreported order denying petitioner's petition for rehearing and suggestion for rehearing en banc is reprinted at Pet. App. 100a-101a.

The unreported opinion of the district court denying petitioner's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is reprinted at Pet. App. 30a-44a. The jury's verdict is reprinted at Pet. App. 45a-46a, and the judgment as to liability is reprinted at Pet. App. 47a-48a. Opinions of the district court with respect to damages are reprinted at Pet. App. 49a-76a (opinion filed July 12, 1989), Pet. App. 77a-80a (opinion filed April 16, 1990), and Pet. App. 81a-95a (opinion filed October 9, 1990). The journal entry of final judgment is reprinted at Pet. App. 96a-97a, and the final judgment is reprinted at Pet. App. 98a-99a.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1993. A timely petition for rehearing was denied on July 16, 1993 (Pet. App. at 100a-101a). On October 1, 1993, following timely application, this Court, per Circuit Justice Ginsburg, entered an order extending the time for filing a petition for certiorari to and including November 15, 1993 (Pet. App. at 102a). This petition is filed by that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides in pertinent part as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in

> an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Respondents, plaintiffs below, were employed by John Morrell & Co. ("Morrell" or "the Company") at Morrell's Rodeo Meats ("Rodeo") meatpacking plant in Arkansas City, Kansas. The plant was covered by a 1979 collective bargaining agreement ("the 1979 Agreement") between Morrell and petitioner United Food and Commercial Workers International Union, AFL-CIO CLC ("UFCW" or "the International Union") and the UFCW local unions at Morrell's ten plants, including UFCW Local 340, the Local Union at the Rodeo plant. Respondents were members of the UFCW and of Local 340.

In June 1982, Morrell closed the Rodeo plant. In February 1983, the Company reopened the facility under a new name, with a workforce only one quarter the size of the Rodeo workforce and at wage and benefit levels far below what had been provided under the Rodeo collective bargaining agreement.[1]

The 1979 Agreement provided in section 10 that Morrell's right "to . . . decrease the working force" could not be exercised "for the purpose of discrimination against any Employee or to avoid any of the provisions of this Agreement, or any local agreement."[2]

The 1979 Agreement also provided the exclusive method for enforcing this contractual right. The Agree-

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[1] Appendix to Appellee/Cross Appellant's [UFCW's] Brief on Appeal ("D. App.") at 650.

[2] Appendix to Petition for Certiorari ("Pet. App.") at 33a.

ment established a grievance-arbitration system for resolving claims that the Agreement had been breached. Under that system grievances could be filed by employees and by the *Local* Union. The Agreement provided too that the *Local* Union was fully authorized to take unresolved grievances to arbitration: "the executive board of Local Union 340 shall make the final decision as to whether any Union Grievance shall go to arbitration."[3] And, in common with most such labor contracts, the Agreement provided that if a grievance were taken to arbitration, the determination of the arbitrator would be the final and binding resolution of the contract dispute.[4]

It is undisputed that *no* member of the plaintiff class ever requested in any way, formally or informally, that a grievance be filed against Morrell with respect to whether Morrell's closing of the Arkansas City plant had been in breach of section 10 of the 1979 Agreement. It also is undisputed that neither the Local Union nor the International Union stated, or even suggested, to any member that such a grievance should not be filed.

Instead of filing a grievance to assert their claim that Morrell had breached section 10 of the 1979 Agreement, respondents filed suit in federal court against Morrell, the International Union and Local 340. Respondents then settled with Morrell.[5] At trial respondents advanced no

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[3] Appendix to Plaintiffs/Appellants' Brief in the court of appeals ("P. App.") at 273. Local 340 "handled [its] own arbitrations," although the Local sometimes received "International Union assistance." 5-19-88 Transcript at 45-46, D. App. at 1151-1152.

[4] P. App. at 247-248, 272-273.

[5] Respondents received in settlement a cash payment of $1,200,000, and $400,000 in coupons for Morrell meat products. District Court Document ("Doc.") 240. One-third of the total recovery ($533,300), as well as $46,607.73 in expenses, was paid to respondents' counsel pursuant to a contingency-fee arrangement. Doc. 250, D. App. at 37. As part of the settlement, Morrell released four documents that had not previously been revealed to respondents or to the UCFW;

contention—let alone any evidence—that Local 340 was anything but a perfectly faithful bargaining representative of the class members. Indeed, officers of Local 340 who had the authority to handle grievances were members of the class.[6] The district court therefore directed a verdict in favor of the Local Union at the close of the evidence at trial, a ruling which respondents did not contest.[7]

After an eight-week jury trial, followed by protracted remedial determinations, damages in excess of $4 million were assessed against the International Union solely on the ground that Morrell had breached section 10 and that the International Union had "failed to take appropriate steps to remedy Morrell's breach." [8]

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those documents proved that Morrell had devised in 1981 a secret plan to close the Rodeo plant and to reopen it later as a nonunion plant. P. App. at 404-416; D. App. at 1015-1018. One of those documents revealed that the Company's strategy was one of "*concealing* from the [UCFW] its intention [in this regard]." P. App. at 415-416 (internal Morrell memorandum) (emphasis in original).

[6] This included Booker Jennings, who was chairman of the grievance committee, and Donald McBride, the chief steward, who was responsible for "present[ing] [members'] grievances." 4-18-88 Transcript at 119, D. App. at 758. *See also* Plaintiffs Appellants' Reply Brief in the court of appeals, at 21 n. 13 (acknowledging that McBride was chief steward). In addition, several class members were on Local 340's executive board. 4-15-88 Transcript at 107-108, D. App. at 700-701.

[7] Instr. 5, Doc. 559, D. App. at 68.

[8] The district court instructed the jury that "[i]n this case, before the Union could be found liable of any alleged violation of duty of fair representation, the jury must find that Morrell breached the Master Agreement . . . ." Instr. 8, Doc. 559, D. App. at 72. The jury found that Morrell had breached section 10, *see* Pet. App. at 46a, 51a, and the court fashioned its damages award against the Union "based solely on the breach of section 10." *Id.* at 63a.

In fashioning that award, the district court declared that there was "no evidence that the Union caused or participated in Morrell's breach of the 1979 Master Agreement," *id.* at 55a, but that the UFCW had "failed to take appropriate steps to remedy Morrell's breach." *Id.* at 57a. The court held that in view of that failure

B. In the district court and in the court of appeals, the UFCW argued that respondents' claim for damages resulting from the Company's breach of contract was barred by respondents' failure to have even attempted to invoke the grievance arbitration procedure—the procedure established by the contract as the exclusive means for resolving claims of contract breach. The courts below rejected that contention.

In response to the UFCW's argument that respondents could not be excused from pursuing a grievance through the Local Union, which indisputably was a fair representative, the court of appeals stated as follows:

> Although the local unions generally had primary responsibility for enforcing the 1979 Master Agreement, the evidence supports a finding that in the case of Morrell's Section 10 breach, the [International] Union, not the Local, assumed control over the matter. Upon the reopening of [the plant], the [International] Union reassured Plaintiffs that if Morrell had violated the 1979 Master Agreement, the [International] Union, not the Local, would seek to remedy the violation. Therefore, in determining whether Plaintiffs are required to exhaust, the relevant inquiry is whether the [International] Union, not the Local, breached its duty of fair representation. [Pet. App. at 12a-13a.]

In that discussion of the International Union's role in possible proceedings against Morrell, the court below was

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the UFCW would be held liable for 25% of the damages flowing from Morrell's breach of section 10. *Id.* at 60a. The court stated that such an apportionment was "consistent with" what would result from reconstructing how the damages to the class from Morrell's breach would have been reduced had the UFCW secured an arbitration award remedying that breach. *Id.* *See also id.* at 23a.

On appeal the Tenth Circuit affirmed the holding that the UFCW should be held liable for 25% of the damages flowing from Morrell's breach of section 10, but the court of appeals directed the district court to redetermine certain aspects of those damages. *Id.* at 15a-17a, 27a-28a.

referring to a letter sent by an International Union representative to the Secretary-Treasurer of Local 340 in February 1983, shortly after Morrell had reopened operations in Arkansas City, which stated, in its entirety, as follows:

> This is to advise that we are investigating the reopening of the Arkansas City plant. If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages, as a result of such violations. [P. App. at 334.][9]

Thus, the court below was referring not to any statements made by the International Union concerning the subject of a possible grievance, but rather to a statement concerning the International Union's pursuit of an unfair labor practice charge that was entirely distinct from —and in no way preclusive of—such a grievance.

Having declared on the basis just described that "the relevant inquiry is whether the [International] Union, not the Local, breached its duty of fair representation," Pet. App. at 12a-13a, the court of appeals went on to state that "[p]laintiffs were . . . not required to exhaust" the grievance-arbitration procedure because they "successfully proved that the [International] Union breached its duty of fair representation." *Id.*

The court below declared that two UFCW actions constituted that breach: "(1) the [International] Union's withdrawal of its unfair labor practice charge, and (2) the [International] Union's entry into [two] side letters [in 1982 negotiations with Morrell]." Pet. App. at 13a. *See also id.* at 9a-10a. The court did not make clear precisely what bearing those actions had on the question

[9] The International Union proceeded to file an unfair labor practice charge in March 1983. However, the charge was withdrawn in July 1983, after Morrell agreed to a new contract covering the Arkansas City facility. *See infra* p. 8.

of plaintiffs' duty to exhaust contractual remedies. Nevertheless, because the court below attributed legal significance to these two actions of the UFCW, we proceed to summarize the facts concerning those actions.

1. Shortly after Morrell reopened operations in Arkansas City, the UFCW filed a charge with the National Labor Relations Board alleging, *inter alia*, that Morrell had violated sections 8(a)(1), (3) and (5) of the National Labor Relations Act (i) by refusing to reemploy many of the former Rodeo workers (*i.e.*, respondents), and (ii) by reducing wages and benefits without recognizing and bargaining with the UFCW.[10] Although at one point the law firm hired by the UFCW to assist in pursuing the charge reported that the NLRB Regional Office had decided to issue a formal complaint against Morrell, that Office ultimately referred the matter to the NLRB Office of Advice in Washington, D.C. for further analysis, and urged Morrell and the UFCW to attempt to resolve the dispute through negotiation.[11] In discussions both with the UFCW and with the NLRB, Morrell threatened to close the plant again if the charge were not dropped.[12] In July 1983 the UFWC was able to secure Morrell's agreement to a contract substantially increasing wages and benefits at the Arkansas City facility, and recognizing the UFCW as bargaining representative (subject to a card check demonstrating that the UFCW had majority support). Based on that agreement, the UFCW agreed to dismiss the unfair labor practice charge.[13]

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[10] P. App. at 401-403.

[11] D. App. at 340, 1100, 1040-1042.

[12] *Id.* at 1041.

[13] *Id.* at 295, 1003-1004, 1044, 1096-1099. The charge later was reinstated after the secret Morrell documents discussed *supra* note 5 had been revealed. The subsequent history of the reinstated charge is detailed in *John Morrell & Co.*, 304 NLRB 896 (1991), *review denied*, 998 F.2d 7 (D.C. Cir. 1993).

2. During the period in which the events of this case unfolded, the meatpacking industry was in crisis. Numerous companies closed at least some of their plants, and demanded significant contract concessions at the remaining plants.[14]

The 1979 Agreement covering the Rodeo plant was a "master agreement" which covered ten Morrell facilities for the period September 1, 1979 through September 1, 1982. However, by late August 1982, only three of those facilities were still open; and under the UFCW's long established practice, any new Master Agreement would cover only those open plants.[15]

The 1979 Master Agreement had contained a provision, section 101, which stated that if Morrell were to open a "new" plant in the "greater Midwest" or the "far West," as distinguished from the "Southeast, Southwest and Northeast," and if the UFCW could demonstrate that it represented a majority of the employees at the new plant, then the plant would "come under the Master Agreement." [16] In the negotiations leading up to the 1982 Master Agreement, Morrell took the position that section 101 should not be included in the new agreement, but Morrell ultimately settled for a side letter clarifying the definition of the geographic regions covered by section 101.[17] The letter stated, *inter alia*, that Arkansas City fell into the Southwest region.[18]

The General Counsel of the International Union's Packinghouse Division advised the UFCW to accept this letter

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[14] *Id.* at 859-864, 1198, 1200-1218, 1322-1326.

[15] *Id.* at 667, 764-765, 886, 913-914, 1131-1132, 1262-1264, 1276-1280, 1374-1376.

[16] P. App. at 258.

[17] D. App. at 302, 942-955, 1391-1400.

[18] P. App. at 295.

because (i) even without the letter, there was a substantial likelihood that Morrell would prevail on its contention that Arkansas City was in the "Southwest" rather than the "Midwest," as those terms had been used in the meat-packing industry;[19] (ii) if an agreement were not reached promptly, Morrell would be free to implement unilaterally its position on this issue;[20] and (iii) the strike that the UFCW had undertaken in resistance to Morrell's contract concession demands appeared to be on the verge of collapsing, with the result that the UFCW would lose all means of resisting Morrell's demands.[21]

A second side letter executed with the 1982 Master Agreement stated as follows:

> The parties agree that nothing in the Master Agreement *executed today* precludes the Company from reopening previously closed plants located at El Paso, Texas, Fort Smith, Arkansas, Arkansas City, Kansas and Memphis, Tennessee and that if such plants are reopened, no provision of *said* Master Agreement requires that such plants be subject to *said* Master Agreement.[22]

The General Counsel of the UFCW Packinghouse Division advised the UFCW to accept this letter because the letter's characterization of the terms of the 1982 Master Agreement was entirely correct.[23] In agreeing to this side letter, the UFCW rejected Morrell's demand for broader language that would have required the UFCW to waive all legal rights that might be implicated by a reopening of a closed plant.[24]

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[19] D. App. at 1399-1400; *see also id.* at 292-293, 765-766, 1114, 1397-1398.

[20] *Id.* at 1398.

[21] *Id.* at 931-932, 937-939, 1393-1394.

[22] P. App. at 296 (emphasis added).

[23] D. App. at 293, 960-962, 967-970, 1412-1416.

[24] P. App. at 329-331; D. App. at 293, 1412.

The courts below did *not* determine, and could not plausibly have determined, that either the withdrawal of the 1983 unfair labor practice charge or the entry into the 1982 side letters operated to prevent the filing and the pursuit by any employee of a grievance complaining that Morrell had breached section 10 of the 1979 Agreement.[25] Rather, the courts below concluded that these actions constituted breaches of the UFCW's duty to fairly represent the plaintiffs, and that, as such, these actions provided a basis for the further conclusion that the UFCW would have prevented the Local Union, which had committed no breach of its fair representation duty, from processing a grievance fairly had any employee requested the Local

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[25] The district court declared that "[t]he plaintiffs' rights were taken away by the execution of the side letter agreements," in that "[a]bsent the side letter agreements, when Morrell reopened the Rodeo Meats plant, the plant would have been covered by the provisions of the Master Agreement. The plaintiffs would have been eligible for rehire at Master Agreement wages." Pet. App. at 39a. The court of appeals characterized the side letters in similar terms. *Id.* at 9a-10a.

It is worthy of note in this regard that the courts below were *not* suggesting that the side letters gave up the right of employees to assert a grievance for breach of section 10 of the 1979 Master Agreement. Even as interpreted by the courts below, the side letters simply acknowledged that if Morrell were to open a "new plant," the 1982 Master Agreement contained no provision dictating that the plant automatically would come under that Master Agreement. *See supra* pp. 9-10. Even if the lower courts were correct in describing this result as a change from what would have been the case absent the side letters, this change could have had *no* effect on employees' rights to assert a grievance for breach of section 10 of the 1979 Master Agreement. Section 10 established a basis for attacking a plant *closing* (or a reduction of the workforce) if a certain *improper intent* were proved. The side letters here, which dealt with the question whether the *opening* of a plant, *without more*, would violate the *1982 Master Agreement*, did not waive claims that the *closing* of Rodeo, for a *prohibited purpose*, violated section 10 of the *1979 Master Agreement*. Indeed, the Union expressly refused to give Morrell a broad waiver that might have had such a reach. *See supra* p. 10.

to do so. However, because no employee ever requested the Local Union or the UFCW to pursue any such grievance, the question as to what the UFCW would have done in the event of a request is by nature hypothetical, as is the lower courts' answer to that question.

REASONS FOR GRANTING THE WRIT

The federal labor policy regarding claims that an employer has breached a collective bargaining agreement is a synthesis that reconciles the rights and obligations of the contracting parties—the union and the employer—and the covered employees and that allocates decision-making authority between private agreed-upon methods for the final adjustment of contract disputes and the public method for so doing—federal court breach of contract suits.

The rules as to when employees who assert that their employer has breached a labor contract are required to proceed through the contract's grievance-arbitration process and when they are entitled to bypass that process in favor of a federal court breach of contract suit are thus at the very core of the federal system for ordering the relations between labor and management during the term of a collective bargaining agreement. These rules determine both the vitality of the policy favoring private dispute settlement and the extent of the federal courts' labor contract case docket.

The most debated—and the most debatable—of these rules for determining the proper contract dispute resolution forum is the exception to the general requirement that employees must process their contract claims through the grievance-arbitration system provided for in the labor contract, that permits an employee direct entry to the federal court when it would be "futile" to process the claim through the otherwise favored contractual dispute resolution system.

The courts of appeals are in conflict on both the nature and the dimensions of this "futility" exception. And, the Tenth Circuit's delineation of the scope of exception is by far the most expansive, and by far the most threatening to the proper functioning of the grievance-arbitration process. Precisely because that is so, the decision below skews the careful balance this Court has struck between fostering the consensual private resolution of disputes under collective bargaining agreements and safeguarding individual employees' interests in having their contract claims fairly and properly resolved.

Given the disarray in the lower court law, the importance of uniformity in the rules governing the application and interpretation of collective bargaining agreements, and the incompatibility of the decision below with the most basic labor law principles, this *certiorari* petition should be granted.

1. "[F]ederal labor policy requires that individual employees wishing to assert contract grievances [in court] must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis by the Court). "[T]here can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Id.* at 653.

The policy is stated in these terms because the norm, as here, is that the labor contract establishes an exclusive grievance-arbitration process for resolving contract disputes pursuant to which the union is given "discretion to supervise the grievance machinery and to invoke arbitration, [and] the employer and the union contemplate that each will endeavor to settle grievances short of arbitration." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). To temper the union's role, the basic exhaustion requirement is subject to an exception whereby an aggrieved employee who makes that attempt and is met by a union that then refuses, in violation of its duty of fair representation,

to process his grievance fairly in the contractual dispute resolution system is entitled to pursue his claim in court. *See Vaca*, 386 U.S. at 185; *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976).

2. The "futility" exception to the basic requirement of exhaustion of contract remedies has its roots in *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969). A number of the courts of appeals have read *Glover* to take the law to the point where an employee is entitled to bring a suit for breach of a labor contract in federal court without even requesting his union to process his grievance if the employee can establish that such a request would have been "futile." *See* cases discussed *infra* pp. 15-17. *Glover* arose out of a less clear-cut set of facts than that, and its precise import is far from clear. Not surprisingly, then, as we have noted, the courts of appeals are in conflict as to its meaning.

(a) In *Glover*, the plaintiffs alleged that their employer, in violation of a collective bargaining agreement, was refusing to promote them because of their race. 393 U.S. at 325. The plaintiffs further alleged that the employer's wrongful conduct was taken "in accordance with . . . a subrosa agreement between [the employer] and certain officials of the Brotherhood [the union acting as their exclusive bargaining representative]." *Id.* And, the plaintiffs specifically alleged that they had "called upon the Brotherhood to process a grievance on their behalf with the Company under the machinery provided by the Collective Bargaining Agreement," and that in response to those requests "representatives of the Brotherhood told the Negro plaintiffs time and time again: (a) that they were kidding themselves if they thought they could ever get white men's jobs; (b) that nothing would ever be done for them; and (c) that to file a formal complaint with the Brotherhood or with the Company would be a waste of their time." *Id.* at 326-327.

The Court held that those facts presented "the situation where the effort to proceed formally with contractual

or administrative remedies would be wholly futile," and that such a situation constitutes an "exception[] to the exhaustion requirement." 393 U.S. at 330. The Court explained:

> Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them. [*Id.* at 331 (emphasis by the Court).][24]

The fairest reading of the foregoing is, first, that the fact that a plaintiff has taken actions which *in substance* constitute a request to proceed on his behalf in the grievance-arbitration process satisfies the exhaustion requirement, and, second, that, where that is so, the fact that the plaintiff did not satisfy some or all of the *formalities* attendant to filing a grievance will not be held against him. And, at least this much is plain: neither in *Glover* nor since has this Court addressed the question whether the "futility" exception covers the situation in which an employee *never* has asked the union to file a grievance relating to the conduct of which he complains.

(b) The courts of appeals have sought to fill this open area in different ways.

(i) At least one court of appeals appears to proceed on the premise that the employee's complete failure to request the union to proceed with his grievance is fatal to a federal court breach of contract suit. In *Carr v. Pacific*

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[24] The Court also emphasized that the practices challenged by the plaintiffs in *Glover* had allegedly been carried out pursuant to a tacit agreement between the union and the employer. *Id.* That aspect of *Glover* is not involved in this case, where, as the district court noted, there was "no evidence that the Union caused or participated in Morrell's breach of the 1979 Master Agreement." Pet. App. at 55a.

Maritime Ass'n, 904 F.2d 1313, 1317-18 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), the Ninth Circuit held that the plaintiff employee's failure to invoke the grievance procedure could not be excused regardless of the merit of the plaintiff's contention that the grievance panel was biased. The court held that the claim of bias should itself have been presented to the grievance panel, and the court did not even mention the possibility that such a step might be excused as futile.

(ii) Three other courts of appeals follow an approach that may fairly be characterized, in the words of the Sixth Circuit, as excusing the employee's failure to have raised his grievance with the union only upon "a clear and positive showing of futility." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989) (quoting *Miller v. Chrysler Corp.*, 748 F.2d 323, 326 (6th Cir. 1984)), *cert. denied*, 495 U.S. 946 (1990). Most to the point here, there are numerous cases in the Third, Sixth and Seventh Circuits in which the failure to have requested the union to process a grievance was held *not* to be excusable despite a claim of futility substantially stronger than is presented here.

In *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 388-89 (3d Cir. 1990), for example, the employee's failure to file a grievance was *not* excused even though the union's grievance officer had told the employee to "forget about" the matter in question. In *Roman v. United States Postal Service*, 821 F.2d 382, 389-90 (7th Cir. 1987) the Seventh Circuit held that an employee's failure to have filed a grievance at the first step of the grievance procedure could not be excused even though union officials who would be responsible for handling the grievance at the later steps had advised the employee that the grievance was invalid. And, in *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969), the court held that the plaintiff employee could not be excused for having failed to file a grievance asserting his claim that a change in the collec-

tive bargaining agreement had been procured through fraudulent misrepresentations by the employer, even though the joint union-employer committee that would consider the grievance was the same body as had approved the change in the agreement.[27]

(iii) Thirdly, the Fourth and Fifth Circuits have described the futility exception in somewhat broader terms than the Third, Sixth and Seventh Circuits, and in far broader terms than the Ninth Circuit, albeit still finding the exception *not* to be applicable on the facts presented. *See, e.g., Amburgey v. Consolidation Coal Co.*, 923 F.2d 27 (4th Cir. 1991);[28] *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518 (5th Cir. 1978).[29]

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No other circuit has gone as far as the court below in terms of the circumstances in which the complete failure to request the union to proceed with a grievance may be excused as futile.

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[27] *See also Miller v. Chrysler Corp., supra*, 748 F.2d at 326 & n.1 (evidence that one union officer or body was hostile to plaintiff does not establish that resort to the grievance procedure would have been futile, where other officers or bodies also would have had a role in the procedure).

[28] The *Amburgey* Court stated:

> An employee does not make his task any easier by not at least attempting to exhaust his contractual remedies. Certainly, where the employee has actual union performance during the grievance process as evidence, he can better show how it was "grossly deficient." A plaintiff like Amburgey must show that, because of the union's breach of its duty of fair representation, resort to contractual remedies would have been futile. [923 F.2d at 29 (footnote omitted)].

[29] The *Rabalais* Court stated:

> No exhaustion is necessary if . . . exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group "which is in large part chosen by the [employer and union] against whom [his] real complaint is made." [566 F.2d at 519 (quoting *Glover*, 393 U.S. at 330)].

3. Every relevant consideration militates against the radical expansion of the "futility" exception beyond situations in which the employee has in substance but not in every formal term met the exhaustion requirement: *viz.*, has "*attempt*[*ed*] use of the contract grievance procedure agreed upon by the employer and union as the mode of redress." *Maddox*, 379 U.S. at 652.

First of all, it costs an employee virtually no time, effort or expense to initiate the grievance process. A simple request to an appropriate union official that a grievance be filed is generally sufficient to set the process in motion. And, that simple act is of great consequence in that it affords the private system an opportunity to address the dispute.

Second, where, despite the employee's fears, the union does take up the grievance the employee presents, does so in good faith, and prevails, it is self-evident that both the individual employee's interests and the public interests stated in the labor policy are fully vindicated. The same is true if the union pursues the grievance in good faith and in the end the grievance is found to be without merit. No dispute resolution system public or private guarantees every claimant a judgment in his favor in every case and without regard to the facts and the law.

Third, if the employee presents his grievance to the union and the union refuses to act or acts in a manner that breaches the duty of fair representation, the employee suffers one real but relatively modest cost: a delay in pursuing a direct suit in court. But, even putting aside the point that there is no reason to believe that this will happen in a majority of cases, that cost, we submit, is more than outweighed by the resulting gains in simplifying the federal court case and in increasing our confidence in the accuracy of the results. In such a case there are concrete historical facts as to what the union did or did not do in responding to the grievance. The adjudicative task is to determine whether those concrete facts, and the

inferences to be drawn from those facts, establish a breach of the union's duty.[30] In contrast, under the Tenth Circuit's "futility" approach, the district court, or a jury, must hypothesize, from disputed facts as to matters at several removes, what the union would have done—and why the union would have done so—had the plaintiff sought to initiate a grievance. That, of course, is a far more complex and far more uncertain endeavor than judging the adequacy of an actual union response to a grievance actually presented.

Ultimately, what is at stake here is the integrity of the federal labor law rules for allocating decision making authority over contract claims between contractual dispute settlement processes and the federal courts. These rules cut deeply against according a claimant his choice of a forum based on his assessment of which of his choices maximizes his likelihood of success and his potential recovery if he succeeds.

A collective bargaining agreement's substantive provisions and its grievance-arbitration provisions are inextricably intertwined. The parties do not simply agree on the general rules to govern the workplace; they agree on such rules to be interpreted and enforced though a single informal, inexpensive and expeditious dispute settlement process that is under their joint control and that provides for final decisions rendered by an impartial expert decision-maker knowledgeable in the law of the shop. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 226-227 (1983) (employer has right to rely on grievance-arbitration process as the "uniform exclusive method" for settlement of contract disputes); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 580-582 (1960) (parties entrust interpretation and application of the collective bargaining agreement to a labor arbitrator "chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring

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[30] *See supra* pp. 13-14.

to bear considerations which are not expressed in the contract as criteria for judgment"); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 41 (1987) (reliance on arbitral expertise is especially crucial "when it comes to formulating remedies"). Permitting an employee to entirely bypass the grievance-arbitration system works an unwarranted sacrifice of all of those values and by so doing changes the bargain the parties have struck through free collective bargaining. That result would fly in the face of "[t]he unmistakable policy of Congress stated in § 203(d) [of the Labor Management Relations Act], 29 U.S.C. § 173(d). . . .: 'Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' " *Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 411-12 (1976) (quoting *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377 (1974)).

As Justice Harlan explained in the opinion for the Court in *Maddox*, 379 U.S. at 653:

> A . . . rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 [(1962)].

The adverse consequences for the public contract dispute resolution system—the federal courts—are just as real and present. As Judge Easterbrook writing for the Seventh Circuit has stated:

> A depressingly large number of recent cases grows out of refusals to use or abide by the grievance-arbitration machinery of collective-bargaining agreements. . . . Those who refuse to invoke the process or abide by the awards endanger the productivity of the workplace and divert judicial time from the disputes that courts are supposed to resolve. [*Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (citations omitted).]

In sum, the time is now ripe for this Court to resolve definitively whether direct actions in federal court are to be allowed where there was never even an attempt to invoke the contractual grievance-arbitration process, and, if so, the circumstances that permit such evasion of contractual dispute resolution systems. This petition for certiorari should be granted for that purpose.

CONCLUSION

For the foregoing reasons, this Court should grant the instant petition for certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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